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## Taking Out The Old And Bringing In The New: The Effect Of The Uniform Fraudulent Transfer Act On Florida Fraudulent Conveyance Law

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## **Abstract**

Spring cleaning at the first regular session of the 1987 Florida legislature resulted in the scrapping of three statutes regarding fraudulent conveyances and the adopting of the Uniform Fraudulent Transfer Act in their place.

**KEYWORDS:** value, conveyance, law

# Taking Out The Old And Bringing In The New: The Effect Of The Uniform Fraudulent Transfer Act On Florida Fraudulent Conveyance Law

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## I. Introduction

Spring cleaning at the first regular session of the 1987 Florida legislature resulted in the scrapping of three statutes<sup>1</sup> regarding fraudulent conveyances and the adopting of the Uniform Fraudulent Transfer Act in their place.<sup>2</sup> This step towards modernization is long overdue, considering the current fraudulent transfer statute was adopted by

1. 1987 Fla. Laws, ch. 87-79 § 13 repealed FLA. STAT. §§ 726.01, 726.07, and 726.08. Section 726.01 rendered conveyances made with the intent to delay, hinder or defraud creditors voidable. Section 726.07 made every conveyance of land made for the purpose of defrauding and deceiving subsequent purchasers voidable. Conveyances of land to bona fide purchasers for good consideration were excepted. Section 726.08 made conveyances with power of revocation voidable against subsequent purchasers.

2. Uniform Fraudulent Transfer Act, Ch. 87-79 (1987 Fla. Sess. Law Serv. (West)), codified at FLA. STAT. §§ 726.101-.112 (1987). Florida joins the dozen or more states which have adopted the U.F.T.A.. The states adopting the Act are: California, Hawaii, Maine, North Dakota, Oklahoma Oregon, Rhode Island, and West Virginia. See INFORMATION KIT-THE UNIFORM FRAUDULENT TRANSFER ACT (prepared at the Office of the National Conference of Commissioners on Uniform State Laws) 1 (1986). The states introducing the Act in 1986 are: Colorado, Connecticut, Delaware, Idaho, Massachusetts, Minnesota, New Jersey, and Wisconsin. *Id.* The information kit was referred to by the House of Representatives and the Senate Committee in examining the new Act prior to its adoption in Florida. The Act went into effect in Florida on January 1, 1988.



Florida in 1823.<sup>3</sup> The importance of modernizing Florida's fraudulent conveyance law is obvious. Debtors threatened with financial ruin continuously devise new and ingenious plans and schemes to escape paying their creditors. The law should be equally prepared to deal with such tactics. One popular method financially ailing debtors use to avoid paying their creditors is to transfer their assets to another person so that there are no assets to satisfy the claims. The law of fraudulent conveyances developed to equip a defrauded creditor with ammunition to attack and set aside a debtor's fraudulent transfer.

This article will examine Florida fraudulent conveyance law under the old law, Florida Statute section 726.01. The statute renders void any transfers made by debtors with the intent to hinder, delay or defraud creditors.<sup>4</sup> Because it is very difficult to prove fraudulent intent, the Florida courts established a basic set of principles and rules to aide a creditor in establishing his case.

This article will also examine the Uniform Fraudulent Transfer

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3. FLA. STAT. § 726.01 (1985). In order to fully appreciate the step the legislature has taken, the current statute is provided in full:

Every feoffment, gift, grant, alienation, bargain, sale, conveyance, transfer and assignment of lands, tenements, hereditament, and of goods and chattels, or any of them, or any lease, rent, use, common or other profit, benefit or charge whatever out of lands, tenements, hereditaments or goods and chattels, or any of them, by writing or otherwise, and every bond, note, contract, suit, judgment and execution which shall at any time hereafter be had, made or executed, contrived or devised of fraud, covin, collusion or guile, to the end, purpose or intent to delay, hinder, or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, demands, penalties or forfeitures, shall be from henceforth as against the person or persons, or bodies politic or corporate, his, her or their successors, executors, administrators and assigns, and every one of them so intended to be delayed, hindered or defrauded, deemed, held, adjudged and taken to be utterly void, frustrate and of none effect, any pretense, color, feigned consideration, expressing of use or any other matter or thing to the contrary notwithstanding; provided, that this section, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditament, leases, rents, uses, commons, profits, goods or chattels which shall be had, made, conveyed or assured if such estate shall be, upon good consideration and bona fide, lawfully conveyed or assured to any person or persons, or body politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud or collusion as aforesaid, anything in this section to the contrary notwithstanding.

*Id.*

4. *See id.*



Act [hereinafter U.F.T.A.] to determine the effect the Act will have on Florida fraudulent conveyance law. The positive and negative aspects of the Act are analyzed, as well as its history and background. This examination will provide attorneys with a sketch of the new law and a method with which to apply it to future fraudulent transfer cases.

## II. Historical Overview of Fraudulent Conveyance Law

The first legislative attack on fraudulent transfers came in 1571 when the English Parliament passed the Statute of 13 Elizabeth.<sup>5</sup> The statute made illegal and void any transfer conducted for the purpose of hindering, delaying or defrauding creditors.<sup>6</sup> Almost every American jurisdiction adopted the English statute in some form or another, either by enacting a similar statute of their own, or by adopting it as part of their common law.<sup>7</sup> The most difficult aspect of enforcing the statute came with proving the debtor's intent to defraud his or her creditors. There is seldom, if ever, direct proof of a deceiver's state of mind, so the courts started recognizing certain objective factors to establish the debtor's wrongful intent.<sup>8</sup> The most famous case interpreting the English statute is *Twyne's Case*,<sup>9</sup> where Lord Coke identified these objective factors as "badges of fraud."<sup>10</sup>

The weight given to such badges varied greatly among the states. Consequently, the National Conference of Commissioners on Uniform State Laws met in 1915 with the hope of minimizing the confusion surrounding fraudulent transfers.<sup>11</sup> The result of this meeting was the

5. 13 Eliz. ch. 5 (1571).

6. See 1 G. GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* §§ 58-61e (rev. ed. 1940).

7. Kennedy, *The Uniform Fraudulent Transfer Act*, 18 U.C.C. L.J. 195 (1986).

8. M. BIGELOW, *THE LAW OF FRAUDULENT CONVEYANCES*, 515-28 (K. Knowlton 2d ed. 1911).

9. 3 Co. Rep. 80b, 76 Eng. Rep. 809 (Star Chamber 1601) (In avoiding the preferential transfer of the debtor's farm and personal property, the court announced six objective factors or "badges of fraud.")

10. *Id.* at 812-14. Lord Coke identified the indicators of fraud as: (1) the conveyance was general, not excepting apparel or other necessities; (2) the transferor retained possession of goods and treated them as his own, thereby deceiving persons trading with him; (3) the transfer was secret; (4) the transfer was made during the pendency of a writ directed against the transferor; (5) the transfer was made to create a trust for the benefit of the transferor; (6) the deed of transfer contained recitals that it was made honestly, truly, and bona fide.

11. *Prefatory Note, UNIFORM FRAUDULENT TRANSFER ACT*, 7a U.L.A. 6394



Uniform Fraudulent Conveyance Act of 1918 [hereinafter U.F.C.A.]. The Act codified the best decisions applying the statute of Elizabeth.<sup>12</sup> The U.F.C.A. provided that proof of certain combinations of facts would conclusively establish fraud without regard to the actual intent of the parties. However, if these certain facts were not available then actual fraudulent intent must be proved.<sup>13</sup> While the U.F.C.A. aided the courts in the articulation of fraudulent conveyance law, subsequent developments influenced the Conference of Commissioners on Uniform State Laws to update the Act in 1979. First, the proper interpretation of specific language used in the Act, as in the definition of "fair consideration" and "good faith," differed among the jurisdictions.<sup>14</sup> Second, the jurisdictions were uncertain as to the procedural steps required for avoiding a fraudulent conveyance. The courts were also in conflict as to who had standing as a creditor in a suit to set aside a fraudulent transfer.<sup>15</sup> Third, and recently, the jurisdictions conflicted as to whether property sold at a regularly conducted, noncollusive foreclosure sale for less than seventy percent of the property's actual value was a fraudulent conveyance under the Act.<sup>16</sup>

The Commissioners on Uniform State Laws also considered various changes occurring in other areas of the law. The Bankruptcy Reform Act of 1978 changed its sections dealing with fraudulent conveyances.<sup>17</sup> The revised Model Corporation Act, the Model Rules of Professional Conduct and the Uniform Commercial Code also persuaded the Commissioners to revise the U.F.C.A.<sup>18</sup>

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(1984).

12. *Id.* The U.F.C.A. has been adopted in twenty-five jurisdictions including the Virgin Islands. *Id.*

13. See U.F.T.A. PREFATORY NOTE, *supra* note 11; See also Alces and Dorr, *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. ILL. L. REV., 527, 532-37 (1985), for a brief, critical overview of the U.F.C.A., as well as a thorough analysis of the new Act.

14. Note, *Good Faith and Fraudulent Conveyances*, 97 HARV. L. REV. 495, 497 (1983) (discussed the conflicting constructions of the U.F.C.A.'s good faith requirement).

15. Alces and Dorr, *supra* note 13, at 536.

16. *Id.* at 536-37. The landmark case discussed in this article was *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980), in which the court held that section 67(d) of the Bankruptcy Act, which is practically the same as section 4 of the U.F.C.A., could be used to set aside foreclosure sales as fraudulent transfers.

17. See U.F.T.A. PREFATORY NOTE, *supra* note 11; Kennedy, *supra* note 7, at 198-99.

18. See Kennedy, *supra* note 7 at 198-99. The committee on corporate laws sug-



Florida never adopted the U.F.C.A. and still maintained a statute it had adopted in 1823, which was based on the English Statute of Elizabeth. Florida was not the "odd man out" since only half the states adopted the U.F.C.A.<sup>19</sup> However, after considering the provisions of the new U.F.T.A., the Florida legislature decided to adopt the new act.

### III. The U.F.T.A.:<sup>20</sup> A Section By Section Analysis

#### A. Introduction

The U.F.T.A. is a revision of the U.F.C.A.<sup>21</sup> The change in the name of the Act reflects its applicability to transfers of personal property as well as real property.<sup>22</sup> The comments accompanying both the original Act and the revised version acknowledge that neither attempts to be a complete or exclusive law governing fraudulent transfers and obligations.<sup>23</sup>

#### B. Analysis

##### 1. Section One: Definitions

The first section of the U.F.T.A. contains definitions of twelve terms essential to the understanding of fraudulent conveyances.<sup>24</sup> The

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gested the conference review its provisions of the U.F.C.A. to determine if the two acts agreed to the treatment of dividend distributions. The U.C.C. changed related rules of law regulating the transfers of personal property, and more particularly in the area of bulk transfers and perfection of securities. Furthermore, the Model Rules of Professional Conduct, adopted by the House of Delegates of the American Bar Association prohibit a lawyer from aiding a client in conduct the a lawyer knows is fraudulent. *Id.*

19. See Kennedy, *supra* note 7, at 195-96.

20. In analyzing the Uniform Fraudulent Transfer Act, all references made by the author refer to the original act located in the Uniform Laws Annotated, and not to the Florida version of the Act, as codified in FLA. STAT. §§ 726.101-.112 (1987).

21. The U.F.T.A. was approved by the National Conference of Commissioners on Uniform State Laws at its annual conference in Colorado, on August 3, 1984. The American Bar Association, House of Delegates, approved the U.F.T.A. on February 13, 1985. See Kennedy, *supra* note 7, at 195.

22. *Id.* at 199.

23. See *id.* at 200 n.21.

24. UNIFORM FRAUDULENT TRANSFER ACT § 1, 7a U.L.A. 639 (1984) [hereinafter U.F.T.A.]. The Act defines the following terms: affiliate, asset, claim, creditor, debt, debtor, insider, lien, person, property, relative, transfer, and valid lien.



Act broadly defines "claim" as any "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."<sup>25</sup> A "creditor" is anyone who has a claim, and a "debtor" is anyone who is liable on a claim.<sup>26</sup>

The Act's definition of "insider" comes from the Bankruptcy Code,<sup>27</sup> and includes almost anyone in a position to control the debtor.<sup>28</sup> The detailed definition of an "insider" lends itself to predictability and certainty when the courts are asked to determine whether a transfer, which was made to someone closely associated with the debtor-transferor, is fraudulent as to a certain creditor.<sup>29</sup> The U.F.T.A. offers a broad definition of "transfer"<sup>30</sup> which subjects almost any type of transaction that is prejudicial to a creditor to attack.<sup>31</sup>

## 2. Section Two: Insolvency

Section two of the U.F.T.A. defines "insolvency" in the same terms as the Bankruptcy Code. First, the Act requires a comparison of the value of the debtor's liabilities to the value of the debtor's assets.<sup>32</sup> Second, the Act adopts the "equitable" test of insolvency: a debtor is insolvent when the debtor is generally not paying debts as they become due.<sup>33</sup> Under this test the debtor has the burden of proving solvency.<sup>34</sup>

25. *Id.* at § 1(3).

26. *Id.* at § 1(4) and § 1(6) respectively.

27. See 11 U.S.C.A. § 101(28) (West Supp. 1985).

28. See U.F.T.A., *supra* note 24, at § 1(7). Comment (7) to this section provides additional explanation for the meaning of "insider."

29. Alces and Dorr, *supra* note 13, at 551-57. This article gives a thorough discussion of the U.F.T.A.'s exceptional treatment of insider transfers and whether the Act accomplishes its goal. The authors of this article are basically unhappy with the Act's vacillation between a specific stance in section 1(7) and a general, more lenient position in section 5(b). The authors feel "section 5(b)'s reference to the insider transferee's reasonable belief sacrifice[s] any certainty and predictability that the detailed insider definition provides." *Id.*

30. U.F.T.A., *supra* note 24, at § 1(12).

31. See Alces and Dorr, *supra* note 13, at 549. The authors mention that it was "the comprehensiveness of the transfer concept" that made involuntary transfers such as foreclosure sales subject to avoidance as fraudulent transfers. *Id.* at 550.

32. U.F.T.A., *supra* note 24, at § 2(a).

33. *Id.* at § 2(b). See also the Bankruptcy Code, 11 U.S.C. § 303(h)(1) (1982), amended in 11 U.S.C.A. § 303(h)(1) (West Supp. 1985).

34. See U.F.T.A., *supra* note 24, at § 2, comment (2). According to the comment, courts should inquire into the circumstances of each particular debtor, and



### 3. Section Three: Value

Section three of the Act provides a general definition of "value," adopted from the Bankruptcy Code. The reason for this non-exclusive definition is to effect the purpose of the Act: "to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors."<sup>35</sup> The Act defines "value" as including the exchange of property in a transfer or obligation, and the securing or satisfaction of an antecedent debt. However, value does not include an unperformed promise unless the promise is made in the ordinary course of the promisor's business to furnish support to the debtor or another person.<sup>36</sup>

The most significant change in the new Act's definition of value is in section 3(b) in which the Act conclusively presumes that the value received is sufficient when parties transfer property pursuant to a regularly conducted, noncollusive foreclosure sale or execution of power of sale.<sup>37</sup> The comment gives the premise behind the section as being that a "sale of the collateral by the secured party as the normal consequence of default . . . [is] the safest way of establishing the fair value of the collateral. . . ."<sup>38</sup>

### 4. Section Four: Transfers Fraudulent as to Present and Future Creditors

Section four, subsection (a)(1), gives the basic rule of the Act that a transfer made or an obligation incurred with the actual intent to hinder, delay or defraud creditors is voidable by a creditor. Subsection (b) specifies eleven factors a court may recognize in assessing the debtor's and the transferee's intent.<sup>39</sup> The comment proceeding this section ex-

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should consider such factors as the number of accounts payable, the amount unpaid, the age of the accounts, and any legitimate disputes which might account for nonpayment. *Id.*

35. *Id.* at § 3, comment (2).

36. *Id.* at § 3(a). The accompanying comment to this section gives examples of executory promises that may support a transfer. They include: a transfer in consideration of an assumption of a debt, a promise by a builder to make repairs, or a farmer's promise to maintain the owner's farm. *Id.* at comment (3).

37. *Id.* at § 3(b).

38. *Id.* at § 3 comment (5) (quoting G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY, 1227 (1965)).

39. U.F.T.A. § 4(b) lists the factors as follows:

- (1) the transfer was made to an insider;
- (2) the debtor retained possession or control of the property transferred



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plains that this list is not inclusive and "proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor's actual intent but does not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent obligation."<sup>40</sup>

Subsection (a)(2) sets out two types of transfers that are constructively fraudulent transfers. Because of their very nature, they should be set aside, regardless of the intent of the parties.<sup>41</sup> The U.F.T.A. made a significant change in the area of constructive fraud by removing the issue of the transferee's good faith. This change occurred when the drafters substituted "reasonably equivalent value" for "fair consideration" which was the prerequisite under the old Act.<sup>42</sup> Good faith is still

after the transfer;

(3) the transfer was concealed;

(4) before the transfer was made, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred;

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

See U.F.T.A. § 4(b).

40. See *id.* at § 4(b), comment (5).

41. *Id.* at § 4(a)(2). This section provides that:

A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the was obligation incurred, if the debtor made the transfer or incurred the obligation:

(2) without receiving reasonably equivalent value in exchange for the transfer or obligation, and the debtor;

(i) was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor's were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur debts beyond his [her] ability to pay as they became due.

*Id.*

42. *Id.* at § 4 comment (2).



available to transferees as a defense to the avoidance action.<sup>43</sup>

### 5. *Section Five: Transfers Fraudulent as to Present Creditors*

Section five (a) of the U.F.T.A. provides that a transfer made without receiving reasonably equivalent value in exchange for the transfer, while the debtor is insolvent, or which will cause him to become insolvent is voidable only as to creditors whose claims were in existence at the time of the transfer. Section five (b) adds a new type of voidable transfer, namely, a preferential transfer made by a debtor to an insider for an antecedent debt, while the debtor is insolvent and when the insider had reasonable ground to believe the debtor was insolvent, is voidable as to existing creditors.<sup>44</sup> This provision does not apply when the debtor receives new value from the insider.<sup>45</sup> An insider who lends money to a debtor in exchange for the satisfaction of an antecedent debt, but who also secures a valid lien, is subject to attack.<sup>46</sup> An insider may defend himself or herself from attack if the transfer is made in the ordinary course of business between the insider and the debtor, or the insider made the exchange in the attempt to rehabilitate the debtor.<sup>47</sup>

### 6. *Section Six: When the Transfer is Made or the Obligation is Incurred*

Another unresolved area of fraudulent conveyance law concerns the date the cause of action arises. The timing of a transaction is important because the status of the debtor, the value of the consideration, and the intent of the parties to the transfer are all determined at the time of the transfer.<sup>48</sup> What might have been a legitimate transfer at the time of the exchange may become a voidable one when perfected, because while the transferor becomes insolvent, the asset transferred may increase in value, or the consideration exchanged may decrease in value.<sup>49</sup>

43. *Id.* See also U.F.T.A. § 8 for defenses to actions setting aside transfers as fraudulent.

44. See *id.* at § 5(b).

45. *Id.* at § 8(f)(1) (defenses).

46. *Id.*

47. *Id.*

48. Kennedy, *supra* note 7, at 209.

49. *Id.*



Section six concerns itself with postponing the effectiveness of a transfer for the purposes of avoidance until it is perfected against certain third parties. The purpose behind this provision is to protect creditors of the transferors from being time barred when the fact of the transfer was never disclosed to them.<sup>50</sup> Perfection is usually effectuated by notice filing, recording or delivery of unequivocal possession.<sup>51</sup>

## 7. Section Seven: Remedies of Creditors

The remedies available to a creditor who has been defrauded by a debtor include, in addition to avoiding the transfer, obtaining an injunction against the debtor or transferor, requesting the court appoint a receiver to take charge of the asset transferred, getting an authorization of the issuance of an attachment, obtaining a court authorized levy of execution on an asset that has been transferred or its proceeds, and

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50. *Id.* at 208.

51. See U.F.T.A., *supra* note 24, at § 6 comment (1). Section six of the Act provides:

(1) a transfer is made:

(i) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest superior to the interest of the transferee; and

(ii) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this [Act] that is superior to the interest of the transferee;

(2) if applicable law permits the transfer to be perfected as provided in paragraph (1) and the transfer is not so perfected before the commencement of an action for relief under this [Act], the transfer is deemed made immediately before commencement of the action;

(3) if applicable law does not permit the transfer to be perfected as provided in part (1), the transfer is made when it becomes effective between the debtor and the transferee;

(4) a transfer is not made until the debtor has acquired rights in the asset transferred;

(5) an obligation is incurred;

(i) if oral, when it becomes effective between the parties; or

(ii) if evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

See *id.* at § 6.



any other appropriate relief.<sup>52</sup> A creditor does not have to get a judgment against the debtor-transferor or have a matured claim in order to avoid a fraudulent transfer.<sup>53</sup>

### 8. *Section Eight: Defenses, Liability, and Protection of Transferee*

Section eight of the Act protects transferees who take property from a debtor in good faith and for a reasonably equivalent value.<sup>54</sup> Subsection (b) provides that the value of the asset transferred is limited to the value of the leviable interest of the transferor.<sup>55</sup> Subsection (c) is new and provides that the measure of recovery for a defrauded creditor against a transferee is limited to the value of the asset transferred at the time of the transfer.<sup>56</sup> Subsection (d) gives a good faith transferee the extent of value given a debtor for the transfer. The transferee can get a lien on the asset transferred, or he can enforce any obligation incurred, or he can get a reduction in the amount of liability on the judgment. Subsection (e) protects transfers resulting from the termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law, and it provides for enforcement of security interests in compliance with article 9 of the Uniform Commercial Code. Subsection (f) protects preferential transfers to insiders if the transferee can show at least one of three conditions: (1) If the transferee gave new value or unsecured credit to the debtor after the transfer; (2) made the transfer in the ordinary course of business between the transferee and the debtor; or (3) exchanged assets pursuant to a "good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor;"<sup>57</sup> the transfer will not be set aside as fraudulent.<sup>58</sup>

52. See *id.* at § 7.

53. *Id.* at section 7, comment (4), and § 1 (3) and (4).

54. *Id.* at § 8(a) and comment (1).

55. *Id.* at § 8(b) and comment (2). Comment 2 tells us that this section is derived from § 550(a) of the Bankruptcy Code.

56. *Id.* at § 8(c). Comment (3) states the premise for this is that changes in the value of the asset transferred after the transfer should ordinarily not affect the amount the creditor receives.

57. *Id.* at § 8(f).

58. See *supra* section III B(3) of this article, discussing value. See also U.F.T.A. § 8. The accompanying comments to that section note that this provision is adopted from § 547 (c)(4) of the Bankruptcy Code. New value may consist of money, goods,



### 9. *Section Nine: Extinguishment of a Cause of Action*

Section nine is significant in that it gives a statute of limitations applicable to the avoidance of fraudulent transfers, where before there was none. Under section 9(a), transfers made by the debtor with actual fraudulent intent to defraud creditors must be attacked within four years after the transfer was made, or if later, within one year after the transfer could have been discovered.<sup>59</sup> In actions for constructive fraud, under sections four (a)(2) and five (a), a claim must be brought within four years after the transfer was made.<sup>60</sup> For transfers made to insiders, section five(b) of the Act, a claim must be made within one year after the transfer was made.<sup>61</sup>

### 10. *Section Ten: Supplementary Provisions*

This section basically says that the U.F.T.A will be supplemented by other law. The law relating to principle and agent, estoppel, laches, misrepresentation, fraud, duress, coercion, mistake, and insolvency, supplement the Act's provisions.<sup>62</sup>

### 11. *Section Eleven: Uniformity of Application and Construction*

This section requires that in interpreting the Act, precedent from other states that have enacted the Act should be used to maintain uniformity and certainty.

The last two sections provide for the title of the Act and the repealing of the current statute on the adopting state's books.<sup>63</sup>

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services delivered, unsecured credit and release of a valid lien. Courts must look for a pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer. As to the rehabilitation of the debtor by the insider, the court must look at the amount of the present value given, the size of the antecedent debt secured, and the likelihood of success of rehabilitation, to determine if the insider acted in good faith. *Id.* at comment (6) § 8.

59. See U.F.T.A., *supra* note 24, at § 9.

60. *Id.* at § 9(b).

61. *Id.* at § 9(c). Comments (1) and (2) accompanying section 9 mention that this section does not preclude the barring of an avoidance action for laches. See also *infra* § 10.

62. *Id.* at § 10.

63. *Id.* at §§ 11, 12, and 13.



## IV. Florida Fraudulent Conveyance Law

### A. Introduction

Florida fraudulent conveyance law has been governed by both statutory and case law. Florida statute section 726.01, which was repealed in 1987, had not been amended since its adoption in 1823. It permitted the avoidance of any transfer made with "intent to hinder, delay or defraud creditors" unless the transfer was made "upon good consideration and bona fide" to a person without "notice or knowledge of such covin, fraud or collusion."<sup>64</sup>

"A fraud upon creditors consists in the intention by the debtor to prevent his creditors from recovering their just debts by withdrawing his property from the reach of his creditors . . . As the fraud rests upon the debtor's intent, it must exist at the time of the transfer."<sup>65</sup> An evil motive is not required in order to set aside a fraudulent conveyance. Where the legal effect of the transfer is to delay or hinder creditors, it is a fraud in law regardless of the actual intent of the debtor.<sup>66</sup>

### B. Intent to Defraud Creditors

The intent to defraud creditors can be found from the existence of certain indicia or badges of fraud.<sup>67</sup> "While a single badge of fraud standing alone may only generate little more than a suspicious circumstance, insufficient in itself to constitute the requisite fraud to set aside a conveyance, several of them together may afford a basis from which its existence can be inferred."<sup>68</sup> The burden of proof in an action to

64. FLA. STAT. § 726.01 (1985). See *supra* note 3 for the full text of the statute.

65. Bay View Estates Corp. v. Southerland, 114 Fla. 635, 650, 651, 154 So. 894, 900 (1934).

66. Whetstone v. Coslick, 117 Fla. 203, 157 So. 666 (1934).

67. In Cleveland Trust Co. v. Foster, 93 So. 2d 112, 114 (Fla. 1957) the Supreme Court of Florida listed the most important indicators of fraud as the following:

- (a) relationship between the debtor and the transferee;
- (b) lack of consideration for the conveyance;
- (c) insolvency or indebtedness of the debtor;
- (d) the transfer of the debtor's entire estate;
- (e) reservation of the benefits, control or dominion by the debtor;
- (f) secrecy or concealment of the transaction;
- (g) pendency or threat of litigation at the time of transfer.

*Id.*

68. Wieczorek v. H & H Builders, Inc., 475 So. 2d 227, 228 (Fla. 1985), *an-*



establish and set aside a fraudulent transfer is the preponderance of the evidence or the greater weight standard.<sup>69</sup>

### C. *Property Applicable to Satisfying Creditor's Claim*

In Florida, certain property is excluded from repayment of debts.<sup>70</sup> Even if a debtor intentionally transfers his or her assets, with the intent to hinder or delay his or her creditors, the law will protect certain property transfers from attack.

### D. *Transfers Fraudulent as to Existing Creditors*

In *Weathersbee v. Dekle*,<sup>71</sup> the Florida Supreme Court held that a "creditor," within the meaning of Florida statute, section 726.01 is anyone who has a legal claim or demand of a contractual nature in existence at the time when the alleged fraudulent transfer took place. The holder of a contingent claim is as fully protected by the statute as

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swered, 450 So. 2d 867, 874 (Fla. 5th Dist. Ct. App. 1984) (citing *Banner Construction Corporation v. Arnold*, 128 So. 2d. 893, 896 (Fla. 1st Dist. Ct. App. 1961)). In *Wieczorek*, the appellate court affirmed the trial court's finding of intent to defraud creditors for the following reasons: (1) conveyance took place after the action was filed against defendant; (2) at the time of said conveyance defendant was heavily indebted and had a judgment against him; (3) transferee was a business and social friend of the defendant; (4) defendant-transferor estimated the value of the property conveyed between \$185,000 and \$200,000; (5) after the conveyance, defendant was made judgment proof; (6) transferee paid \$23,400 for property estimated at \$185,000 to \$200,000; (7) deed to transferee did not require the satisfaction of any creditor claims; (8) no other creditors were paid until the eve of this court proceeding; (9) a secret lease allowed defendant to remain in possession of property by paying no obligation other than paying the mortgage which he had already been doing; (10) transferor remained in control of the property; (11) the consideration exchanged was grossly inadequate. *Id.* at 871.

69. *Id.* at 872.

70. Homestead property is protected against the claims of creditors. *See Sneed v. Davis*, 135 Fla. 271, 184 So. 865 (1938) (property held pursuant to a resulting trust is not subject to execution by a judgment creditor); *Estey v. Sharp Electronics Corp.*, 409 So. 2d 217 (Fla. 4th Dist. Ct. App. 1982) (annuity contracts are not available to satisfy the claims of judgment creditors pursuant to FLA. STAT. § 222.14, annuity contracts); *In Re Grefen*, 35 B.R. 368, 370 (Bankr. S.D. Fla. 1984) (property owned by husband and wife as tenants by the entireties is not voidable by a creditor of only one spouse unless the tenancy was created to defraud creditors); *Mesa Petroleum Company v. Coniglio*, 629 F.2d 1022 (5th Cir. 1980) (transfers made to bona fide purchasers for value are protected against avoidance); *In Re Matter of Acquafredda*, 26 B.R. 909 (Bankr. M.D. Fla. 1983).

71. 107 Fla. 517, 521, 145 So. 198, 200 (1933).



one that is absolute. In cases of contingent liability, the liability, whenever it happens relates back to the date it was originally incurred.<sup>72</sup> Other protected creditors include personal injury tort claimants,<sup>73</sup> holders of promissory notes,<sup>74</sup> a surety,<sup>75</sup> a spouse entitled to alimony or child support,<sup>76</sup> and the federal government for tax deficiencies.<sup>77</sup>

### E. *Transfers Fraudulent as to Subsequent Creditors*

Under prior Florida law, creditors whose claims arose after the fraudulent transfer were protected with limitation. If a subsequent creditor showed that the debtor actually intended to defraud him at the time of the transfer, the transfer could be set aside. In addition, the subsequent creditor could attack the transfer if he or she showed that the debtor made the transfer in contemplation of incurring future debts.<sup>78</sup>

### F. *Presumption of Fraud Regardless of Intent*

In the area of constructive fraud, the cases show that a court must consider a transferee's intent unless the transferee paid no or nominal consideration in exchange for the property. In *George E. Sebring Co. v. O'Rourke*,<sup>79</sup> the court held that when a creditor shows a transfer was made for no consideration, and the debtor owed money to the creditor, the creditor established a prima facie case of fraudulent transfer regardless of the actual intent of the debtor. Once a creditor shows the transferee paid no consideration for the conveyance, the creditor raises the presumption of fraud and it becomes the debtor's burden to prove the conveyance is legitimate. The fact that a debtor retained control over the property transferred also establishes the presumption of a fraudulent transfer.<sup>80</sup>

72. *Id.*

73. *Money v. Powell*, 139 So. 2d 702, 703 (Fla. 2d Dist. Ct. App. 1962).

74. *Acquafredda*, 26 B.R. at 913.

75. *Reel v. Livingston*, 34 Fla. 377, 16 So. 284 (1894).

76. *Gyorok v. Davis*, 183 So. 2d 701, 703 (Fla. 3d Dist. Ct. App. 1966).

77. *United States v. Ressler*, 433 F. Supp. 459, 463 (S.D. Fla. 1977).

78. *Beasley v. Coggins*, 48 Fla. 216, 225, 37 So. 213, 215 (1904) (court held that "when the debtor has continued, or embarked in a business in which his becoming indebted was inevitable" the subsequent creditor is protected).

79. 101 Fla. 885, 134 So. 556 (1931).

80. *Id.*



### G. Consideration

If the transferee paid adequate consideration, the court must look at the facts and circumstances of the case and determine the extent of the transferee's participation in the fraudulent conveyance.<sup>81</sup> "It is clear that a transferee's equitable interest in the transferred land must be proportionate to the consideration which he had given for the transfer."<sup>82</sup>

### H. Insolvency

In cases of insolvency or of failing circumstances, the presumption of fraud follows the showing of insolvency, regardless of whether the conveyance was voluntary or otherwise.<sup>83</sup> "This presumption or inference of fraud is not conclusive, but is rebuttable and when so rebutted and put in equipoise, it is then the duty of the party" alleging the insolvency to go forward with the evidence.<sup>84</sup> In *Headly v. Pelham*,<sup>85</sup> the court held that the creditor had not met his burden of showing insolvency of the debtor when it failed to show that the debtor corporation "refused" to pay its obligations.<sup>86</sup>

### I. Preferential Transfers

In *Miles v. Katz*,<sup>87</sup> the court held that a debtor's preferential

81. *United States v. Horton*, 760 F.2d 1225 (11th Cir. 1985) (court held that debtor failed to rebut the prima facie case of fraud, where no evidence was offered by the wife to show the relative value of the husband's contribution in the transferred property. The wife had sold her nursing home business and put the proceeds from the sale in a joint bank account).

82. *Id.* at 1229.

83. *Id.* at 1228. *See also* *Weathersbee v. Dekle*, 107 Fla. 517, 524, 145 So. 198, 201 (Fla. 1933) (the court held "in cases of *insolvency*, the fraudulent presumption attaches to all transfers between husband and wife, to such an extent that the wife is required to overcome a presumption of fact that the consideration given was not paid out of her own estate. . . .") (emphasis in the original).

84. *Horton*, 760 F.2d at 1228.

85. 366 So. 2d 60, 63 (Fla. 1st Dist. Ct. App. 1978).

86. The court (quoting *Venice East, Inc. v. Manno*, 186 So. 2d 71 (Fla. 2d Dist. Ct. App. 1966)) held that "where a corporation may be in straitened financial circumstances and have difficulty meeting its obligations, it has not necessarily reached the extreme position of refusing to pay within the meaning of Florida Statute § 608.55." *Id.*

87. 405 So. 2d 750 (Fla. 4th Dist. Ct. App. 1981).



transfer of property to an attorney-creditor cannot be set aside as to other creditors, although the debtor in making the transfer intended to defeat their claims and the preferential creditor had knowledge of such intention, if the preferential creditor did not actually participate in the debtor's fraudulent purpose. Here the attorney knew that the corporate debtor was insolvent, and that the transfer consisted of all the debtor's property to the attorney for an antecedent debt, despite the fact that there were creditors seeking payment from the debtor.

In *Headly v. Pelham*,<sup>88</sup> a brother who owned stock in the debtor's company satisfied an antecedent debt at the expense of other creditors, even though the debtor was insolvent. The court held that no evidence existed that the preferred creditor was in a better financial position by the changes in his securities. Under the new Act this may all change.

## J. Statute of Limitations

There is very little Florida case law on the subject of the time for bringing a fraudulent avoidance action, or when the cause of action expires. The few cases that discuss the topic conflict. In *United States v. Fernon*,<sup>89</sup> the court held that the government's fraudulent conveyance suit arising out of a transfer of beach front property from a taxpayer to the taxpayer's son, who subsequently conveyed the property to himself and his wife, was not barred by the statute of limitations or common-law laches. The court held that Florida statute section 95.11(6) was the applicable statute of limitations, which allowed only two years within which to file suit.<sup>90</sup>

In *In Re Piche*,<sup>91</sup> the court held the applicable Florida statute of limitations in fraudulent transfer suits was four years, pursuant to Florida Statute section 95.11(3).

## K. Remedies

Creditors have the choice of bringing suit in equity to remove the fraudulent transfer as an obstruction to the full enforcement of their judgment lien, or filing a creditor's bill of execution and levy on the

88. 366 So. 2d 60, 63 (Fla. 1st Dist. Ct. App. 1978).

89. 640 F.2d 609, 612 (5th Cir. 1981).

90. *Id.*

91. 55 B.R. 339 (Bankr. S.D. Fla. 1985).



allegedly fraudulently conveyed property.<sup>92</sup> Before creditors can sue to set aside a fraudulent transfer they must allege that they have exhausted their legal remedies by having a writ of execution returned unsatisfied or that they have a first lien upon the property transferred.<sup>93</sup> This rule has few exceptions.<sup>94</sup>

## V. The Effect of The U.F.T.A. on Florida Law

### A. Introduction

The U.F.T.A. will clarify Florida conveyance law by codifying the best decisions under existing fraudulent conveyance law. The Act is a welcome simplification of the archaic Florida statutes, section 726.01 in particular, which consisted of one sentence two hundred and seventy eight words long. The U.F.T.A. gives practitioners a well defined tool to attack fraudulent transfers, as well as a reference to case law from other jurisdictions which adopt the Act. "One intent of this act and other uniform acts is to streamline the legal process through uniform predictable law. To the extent this diminishes litigation and associated costs, savings would result."<sup>95</sup>

The U.F.T.A. also brings Florida conveyance law into harmony with the changes in federal bankruptcy law. Often trustees in bankruptcy find themselves outside the one year transfer limitation under the Bankruptcy Code,<sup>96</sup> and must look to state law in order to set aside a fraudulent transfer. Florida citizens will benefit from the uniform treatment of debtors both inside and outside the context of bankruptcy.

### B. Actual Intent

In section 4 (b), the U.F.T.A. elaborates on the factors that may be considered in determining actual intent. It adds several more

92. *Money v. Powell*, 139 So. 2d 702, 703 (Fla. 2d Dist. Ct. App. 1962).

93. *George E. Sebring Co. v. O'Rourke*, 101 Fla. 885, 134 So. 556 (1931).

94. *See Beasley v. Coggins*, 48 Fla. 215, 37 So. 213 (Fla. 1904) (court held that a trustee in bankruptcy may sue to avoid a fraudulent conveyance without reducing his claim against the debtor to judgment).

95. FLA. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT (April 21, 1987).

96. *See* 11 U.S.C. § 544(b) (1985). This section provides that: "The trustee may avoid any transfer of interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim. . . ." *Id.*



"badges of fraud" to the Florida laundry list of badges.<sup>97</sup>

### C. Subsequent Creditors

The rights of future or subsequent creditors are likely to be expanded. The U.F.T.A. affords a subsequent creditor more protection than he currently enjoys under Florida law. The Act does not require the subsequent creditor to show actual intent to defraud, unlike the prior law in Florida. The constructive fraud provisions of section four broaden the subsequent creditor's rights.<sup>98</sup> Under the old law, subsequent creditors had to establish more than merely constructive fraud based on such conditions as the debtor's insolvency and the transferee's failure to pay reasonably equivalent value. Subsequent creditors had to show fraud in fact or that the debtor made the transfer in contemplation of incurring future debts.<sup>99</sup>

### D. Consideration

The U.F.T.A. provides a more efficient measuring stick for determining value and consideration. Florida case law is scarce concerning what constitutes adequate consideration or value. The U.F.T.A.'s use of the term "reasonably equivalent value" is more accurate than Florida case law discussing adequate consideration. Most of the cases concern transfers made for nominal or no consideration.

Another important effect section three of the Act will have on Florida conveyance law is that regularly conducted, noncollusive mortgage foreclosure sales will not constitute fraudulent conveyances. Banks and other foreclosure creditors now know that their foreclosures will not be set aside. This coincides with the holding in *In re Perido Bay Country Club Estates, Inc.*,<sup>100</sup> that "[t]he amount of the bid for the property at the sale shall be conclusively presumed to be sufficient consideration for the sale."<sup>101</sup>

### E. Insolvency

It will be easier to prove insolvency under the new Act. Section

97. See *supra* section III B 4 of this comment.

98. See *supra* text accompanying notes 40-42.

99. See *Beasley v. Coggins*, 48 Fla. 215, 37 So. 213 (1904).

100. 23 B.R. 36 (Bankr. S.D. Fla. 1982).

101. *Id.* at 40 (quoting FLA. STAT. § 45.031(2) (1985)).



two and the accompanying comments mention that the case law applicable to this section of the Act developed under section 303(h)(1) of the Bankruptcy Code. Under this test, a creditor does not have to show that the debtor absolutely refused to pay its debts, as the previous law required. Under the old law, the burden of proving insolvency rested upon the person attacking the transfer. However, under the U.F.T.A., a creditor can show a debtor is insolvent by showing the he is not meeting his bills or that his debts are greater than his assets. After such a showing, a rebuttable presumption arises and the debtor must give evidence showing otherwise. The U.F.T.A. recognized the difficulty typically imposed on a creditor in proving insolvency in bankruptcy and established the presumption in section two of the Act.

#### F. *Constructive Fraud*

Sections four and five will have an enormous effect as to clarifying what would be a fraud in law, regardless of the actual intent of the parties. However, the U.F.T.A. will limit what prior Florida case law determined presumptively fraudulent. Under the prior law, a transfer made for nominal or no consideration was presumptively fraudulent. Transfers made by insolvent debtors also raised the presumption of fraud, as did the showing that the debtor retained possession of the property after the transfer. The U.F.T.A. raises the presumption of fraud when a creditor shows the debtor was in failing financial condition at the time of the transfer, or that the transfer rendered the debtor insolvent, and the transfer was made for less than reasonably equivalent value.

However, a number of the cases discussed in this comment went through the arduous task of weighing and counting the badges of fraud present at the time of the transfer despite the presence of an insolvent debtor, and the transfer of inadequate consideration. Under the new Act, this counting and weighing of badges is unnecessary. Transfers are legally fraudulent if they involve financially ailing debtors and the exchange of less than reasonably equivalent value.<sup>102</sup>

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102. See *In Re Total Acquisition Corp.*, 29 B.R. 836 (Bankr. S.D. Fla. 1983) (Here the court noted four out of eight badges were sufficient to show fraud. The badges present were insolvency of the transferor, lack of consideration for the transfer, threat of litigation, and the transfer of the debtor's entire estate.); *Wieczorek v. H & H Builders, Inc.*, 475 So. 2d 227 (Fla. 1985), *answered*, 450 So. 2d 867 (Fla. 5th Dist. Ct. App. 1984). (The court proceeded to count the badges of fraud despite the fact the debtor was judgment proof after the transfer and the transfer involved the exchange of



## G. Remedies

Under prior Florida law, a creditor had to allege he had an unsatisfied return judgment to avoiding a fraudulent transfer, except when the transfer involved real property to which the debtor had legal title. However, under the U.F.T.A., no return judgment is necessary. "A creditor is not required to obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed under subsection 7(a)." <sup>103</sup>

## H. Statute of Limitations

The U.F.T.A. will resolve the conflicting statute of limitations issue set forth in Florida case law. The Act sets forth a one year statute for transfers involving insiders; a four year statute for transfers involving actual intent to defraud (or within one year after the creditor discovered the transfer); and a four year statute of limitations for an action based on constructive fraud. <sup>104</sup>

## I. Preferential Transfers

Finally, but most importantly, the U.F.T.A. will make it more difficult for debtors to make preferential transfers. The Act's detailed description of who is an insider, and the provision that certain transfers made by insiders are constructively fraudulent, will put a serious damper on transactions by financially ailing debtors. The Florida cases cited in the section of this comment dealing with preferential transfers were all cases denying the creditor relief. However, under the new insider provisions of the U.F.T.A., it is likely that resolution of such cases would be different. <sup>105</sup> For example, in *Miles v. Katz*, <sup>106</sup> an insolvent debtor corporation transferred a security interest in their property to their attorney. The attorney knew the debtor was insolvent, that the transfer was of all the debtor's assets, and that the debtor had other creditors. However, the court refused to set aside the transfer because the creditor failed to show that the attorney-transferee "actually partic-

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grossly inadequate consideration.).

103. See *supra* text accompanying notes 51-52.

104. See *supra* section III B 9 of this comment.

105. See *supra* section III B 5 of this comment.

106. 405 So. 2d 750 (Fla. 4th Dist. Ct. App. 1981).



ipated"<sup>107</sup> in the alleged fraud or that "he was not acting in good faith in accepting the note and security interest."<sup>108</sup> Today, one can argue that under the U.F.T.A. this type of transfer is constructively fraudulent, since the transfer was made to an insider, for an antecedent debt, the debtor was insolvent at the time and the insider knew the debtor was insolvent. To make this argument, the creditor must show the attorney-transferee is an insider. When the debtor is a corporation, the U.F.T.A. defines an insider as including "a person in control of the debtor."<sup>109</sup> In *Miles*, the corporate debtor's attorney fits into this definition. The only defenses available to the attorney-transferee under U.F.T.A. section eight are that the transfer was made in the ordinary course of business between the parties, or the transferee gave new value or unsecured credit to the debtor, or the transfer was made pursuant to a good faith effort to rehabilitate the debtor.<sup>110</sup> The attorney-transferee in *Miles* would have had difficulty meeting these defenses.

## VI. Conclusion

The U.F.T.A. went into effect in Florida on January 1, 1988. The legislature's enactment of this statute, and its repeal of three previous statutes is a substantial leap towards clarifying the confusing Florida law on the subject. The Act will make significant changes in several areas of fraudulent conveyance law.

*Pamela M. Lund*

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107. *Id.* at 752.

108. *Id.*

109. UNIFORM FRAUDULENT TRANSFER ACT § 1(7), 7a U.L.A. 639 (1984).

110. *Id.* at § 8(f).